

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEVADA

3
4 COPPER SANDS HOMEOWNERS)
ASSOCIATION, INC., *et al.*,)

Case No.: 2:10-cv-00510-GMN-GWF

5
6 Plaintiffs,)

ORDER

vs.)

7 COPPER SANDS REALTY, LLC, *et al.*,)

8 Defendants.)

9
10 **INTRODUCTION**

11 Before the Court is Defendant CS Consulting Service, LLC's Motion for Summary
12 Judgment (ECF No. 250). Plaintiffs, Copper Sands Homeowners Associations, Inc., et al., filed
13 a Response (ECF No. 261) and Defendant filed a Reply (ECF No. 266).

14 **FACTS AND BACKGROUND**

15 This action is based on alleged misconduct in the conversion, sale, and financing of a
16 condominium project. Plaintiffs are the unit owners in the condominium project and its
17 homeowners' association. The developer of the condominiums was Defendant Copper Sands
18 Realty, LLC, which was managed by Defendants Robert Colucci and Dario Deluca. The Third
19 Amended Complaint names over thirty defendants who were allegedly involved in some aspect
20 of the conversion of the property, including the sale and financing of the condominiums and the
21 appraisal or management of the property.

22 On or about April 27, 2004, CS Consulting submitted a proposal to Pacifica Enterprises,
23 a management company for the Developer of the Copper Sands Project, to conduct a reserve
24 study for the subject property. (*See* Proposal, Ex. A attached to MSJ, ECF No. 250.) Plaintiffs
25 were not a party to the Proposal and CS Consulting claims that the Plaintiffs were not an

1 intended beneficiary of the Proposal. The Proposal clearly states that CS Consulting provides
2 such a reserve study without any warranties or guarantees. (*See id.*)

3 Plaintiffs allege four causes of action against CS Consulting: (1) negligence, (2) negligent
4 misrepresentation, (3) breach of contract, and (4) breach of implied warranties. CS Consulting
5 argues that the breach of contract claims must be dismissed because of lack of privity; that the
6 tort claims are barred by the Economic Loss Doctrine; and that the claim of implied warranties
7 fails because of the lack of contractual privity.

8 **DISCUSSION**

9 **A. Legal Standard**

10 The Federal Rules of Civil Procedure provide for summary adjudication when the
11 pleadings, depositions, answers to interrogatories, and admissions on file, together with the
12 affidavits, if any, show that “there is no genuine dispute as to any material fact and that the
13 movant is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(a). A principal purpose
14 of summary judgment is “to isolate and dispose of factually unsupported claims.” *Celotex Corp.*
15 *v. Catrett*, 477 U.S. 317, 323–24 (1986).

16 In determining summary judgment, a court applies a burden-shifting analysis. “When the
17 party moving for summary judgment would bear the burden of proof at trial, it must come
18 forward with evidence which would entitle it to a directed verdict if the evidence went
19 uncontroverted at trial. In such a case, the moving party has the initial burden of establishing
20 the absence of a genuine issue of fact on each issue material to its case.” *C.A.R. Transp.*
21 *Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In
22 contrast, when the nonmoving party bears the burden of proving the claim or defense, the
23 moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential
24 element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving party failed
25 to make a showing sufficient to establish an element essential to that party’s case on which that

1 party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If the
2 moving party fails to meet its initial burden, summary judgment must be denied and the court
3 need not consider the nonmoving party’s evidence. *See Adickes v. S. H. Kress & Co.*, 398 U.S.
4 144, 159–60 (1970).

5 If the moving party satisfies its initial burden, the burden then shifts to the opposing party
6 to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith*
7 *Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the
8 opposing party need not establish a material issue of fact conclusively in its favor. It is
9 sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the
10 parties’ differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*
11 *Ass’n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid
12 summary judgment by relying solely on conclusory allegations that are unsupported by factual
13 data. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go
14 beyond the assertions and allegations of the pleadings and set forth specific facts by producing
15 competent evidence that shows a genuine issue for trial. *See Celotex Corp.*, 477 U.S. at 324.

16 At summary judgment, a court’s function is not to weigh the evidence and determine the
17 truth but to determine whether there is a genuine issue for trial. *See Anderson*, 477 U.S. at 249.
18 The evidence of the nonmovant is “to be believed, and all justifiable inferences are to be drawn
19 in his favor.” *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is not
20 significantly probative, summary judgment may be granted. *See id.* at 249–50.

21 **B. Analysis**

22 **1. Breach of Contract**

23 CS Consulting argues that the breach of contract claim must be dismissed because there
24 is no contract between Plaintiffs and CS Consulting. Furthermore, they argue, the contract
25 between Pacifica Enterprises and CS Consulting was not intended for the benefit of Plaintiffs.

1 In Nevada, in order to enjoy the status of a third-party beneficiary to a contract, “there must
2 clearly appear a promissory intent to benefit the third party . . . and ultimately it must be shown
3 that the third party’s reliance thereon is foreseeable.” *Elizabeth E. v. ADT Sec. Sys. West Inc.*,
4 839 P.2d 1308, 1311 (Nev.1992). “Before a stranger can avail himself of the exceptional
5 privilege of suing for a breach of an agreement, to which he is not a party, he must, at least,
6 show that it was intended for his direct benefit.” *Olson v. Iacometti*, 533 P.2d 1360, 1364
7 (Nev.1975).

8 Plaintiffs argue that they were the intended beneficiary of the contract because the
9 reserve study is required by statute for the benefit of unit owners. *See* N.R.S. 116.3115,
10 116.31152. Plaintiffs urge that it is appropriate to consider the statute and its purpose in
11 determining third-party beneficiary status. *Secretary of State for Defence v. Trimble Navigation*
12 *Ltd.*, 484 F.3d 700, 706 (4th Cir. 2007); *Roedler v. Dep’t of Energy*, 255 F.3d 1347, 1352 (Fed.
13 Cir. 2001) (citing *Rendleman v. Bowen*, 860 F.2d 1537, 1541–42 (9th Cir. 1988) (when the
14 contract terms are mandated by Congress, statutory intent is highly relevant to contractual
15 interpretation)). “In some cases an overriding policy, which may be embodied in a statute,
16 requires recognition of such a right without regard to the intention of the parties.” Restatement
17 (Second) of Contracts §302, Cmt. d (1981). Plaintiffs argue that in this case, the reserve study
18 contract “was mandated by a statute whose exclusive purpose is to protect unit owners” and
19 accordingly it has stated a claim for breach of contract. (Response, 6:17–18, ECF No. 261.)

20 N.R.S. Chapter 116 codifies Nevada’s adoption of the Uniform Common Interest
21 Ownership Act (“UCIOA”), an act adopted by the National Conference of Commissioners on
22 Uniform State Laws. *Boulder Oaks Community Ass’n v. B & J Andrews Enterprises, LLC*, 215
23 P.3d 27 (Nev. 2009); *see* N.R.S. 116.001; A.B. 221, Summary of Legislation, 66th Leg. (Nev.
24 1991). N.R.S. Chapter 116 establishes the specific requirements for reserve studies in Nevada.
25 Generally, the purpose of a reserve study is to give those overseeing the maintenance of the

1 property a better idea of what major expenses to expect and an educated estimate of when these
2 expenses will occur in order to prevent the facilities from falling into disrepair due to poor
3 financial planning.

4 Major revisions to NRS Chapter 116 were accomplished through S.B. 451 in the 70th
5 Regular Session of the Legislature in 1999. The Legislature changed NRS Chapter 116 from
6 only applying new common-interest communities to existing common-interest communities
7 because many of the existing common-interest communities had been “mismanaged with
8 loosely written codes, covenants and restrictions.” Hearing on S.B. before the Assembly
9 Comm. on Judiciary, 70th Leg. (Nev. May 14, 1999). The apparent purpose of the changes was
10 to provide protection to homeowners and remedy management problems of existing common-
11 interest communities.

12 There is no case law directly on point; therefore, this appears to be an issue of first
13 impression. When a federal district court is faced with an issue of first impression under state
14 law, the court must use its best judgment to predict how the highest state court would resolve it
15 “using intermediate appellate court decisions, decisions from other jurisdictions, statutes,
16 treatises, and restatements as guidance.” *Strother v. S. Cal. Permanente Med. Group*, 79 F.3d
17 859, 865 (9th Cir.1996). After reviewing the statute and legislative history of N.R.S. Chapter
18 116 the Court believes that the Nevada Supreme Court would find that the statute is meant to
19 protect homeowners of common interest communities. The requirement of a reserve study could
20 only be meant to provide additional protection to the homeowners in common-interest
21 communities. Accordingly, third party beneficiary status to the contract between the managers
22 and owners of a common-interest community and the reserve study specialist can be established
23 by a homeowner because the homeowner is meant to benefit from the requirement of having a
24 reserve study done. Therefore, Plaintiffs have stated a claim for breach of contract and the
25 Court denies CS Consulting’s Motion for Summary Judgment on this claim.

2. Implied Warranty

CS Consulting argues that Plaintiffs' claim for Breach of Implied Warranty fails because there is no privity of contract between the parties. However, because the Court finds that Plaintiffs are a third party beneficiary to the contract this argument fails.

3. Economic Loss Doctrine

The economic loss doctrine "bars unintentional tort actions when the plaintiff seeks to recover purely economic losses." *Terracon Consultants Western, Inc. v. Mandalay Resort Group*, 206 P.3d 81, 85 (Nev. 2009) (internal quotation marks omitted). This means that "unless there is personal injury or property damage, a plaintiff may not recover in negligence for economic losses." *Id.* at 87; *see also Giles v. General Motors Acceptance Corp.*, 494 F.3d 865, 879 (9th Cir. 2007) ("Broadly speaking, Nevada applies the economic loss doctrine to bar recovery in tort for purely monetary harm in product liability and in negligence cases unrelated to product liability."). The Nevada Supreme Court has applied the economic loss doctrine in product liability cases as well as negligence actions. *See Giles v. Gen. Motors Acceptance Corp.*, 494 F.3d 865, 879 (9th Cir.2007).

The determination of whether the economic loss doctrine precludes a plaintiff's claim is a two-step process. The first step is to ascertain whether the damages are purely economic in nature. *Terracon*, 206 P.3d at 86. A purely economic loss is "the loss of the benefit of the user's bargain including pecuniary damage for inadequate value, the cost of repair and replacement of the defective product, or consequent loss of profits, without any claim of personal injury or damage to other property." *Calloway v. City of Reno*, 993 P.2d 1259, 1263 (Nev.2000) (overruled on other grounds by *Olson v. Richard*, 89 P.3d 31 (Nev.2004) (en banc)). CS Consulting asserts that Plaintiffs' alleged damages are purely economic damages and do not involve bodily injury or other property damage. (*See* TAC, 14:26–15:3; 27:8, ECF No. 154.) Plaintiffs do not dispute that their damages are purely economic and therefore the economic loss

1 doctrine is applicable to Plaintiffs' requested damages.

2 The second step is to determine whether the economic loss doctrine applies to Plaintiffs'
3 claims of negligence and negligent misrepresentation.

4 a. Negligence

5 Plaintiffs argue that under Nevada law, where a statute imposes an independent duty, tort
6 claims involving a breach of that duty are not barred by the economic loss rule. *G.K. Las Vegas*
7 *Ltd. P'ship v. Simon Prop. Group, Inc.*, 460 F.Supp.2d 1222, 1242 (D.Nev. 2006). Plaintiffs
8 assert that NRS 116 imposes on CS Consulting a duty of care in conducting reserve studies.
9 Plaintiffs explain that CS Consulting is a reserve study specialist licensed under NRS Chapter
10 116A. Unit owners' associations are required to establish and fund adequate reserves for the
11 repair, replacement and restoration of major components of the common elements, as well as
12 other portions of the community the association is obliged to maintain, repair, replace or restore.
13 N.R.S. 116.3115(2)(B). In order to establish these reserves, the association must conduct
14 reserve studies. N.R.S. 116.31152(1)(a). The public offering statement that must be issued by
15 persons selling units in common-interest communities must include a reserve study. N.R.S.
16 116.4103(1)(e)(1); N.R.S. 116.4106(c).

17 Plaintiffs argue that to prevent harm to independent unit owners the statute requires that
18 the reserve studies be conducted only by reserve study specialists licensed under Chapter 116A
19 and that no one may act as a reserve study specialist without meeting the qualifications set by
20 the Nevada Commission for Common-Interest Communities and Condominium Hotels. N.R.S.
21 116A.420. Plaintiffs conclude that this means that NRS 116 imposed a duty to exercise
22 reasonable care in conducting reserve studies.

23 However, the Court does not agree. N.R.S. 116 only imposes duties on the management
24 and ownership of the common-interest community. When the Legislature amended NRS
25 Chapter 116 which previously applied only to new common-interest communities to now

1 include pre-existing common-interest communities, the amendment sought to address the
2 problems of many of the pre-existing common-interest communities which had been
3 “mismanaged with loosely written codes, covenants and restrictions.” Hearing on S.B. 451
4 before the Assembly Comm. on Judiciary, 70th Leg. (Nev. May 14, 1999). The legislative
5 history reveals that the adoption of N.R.S. Chapter 116 was intended to remedy management
6 problems of common-interest communities. N.R.S. 116.3115 imposes the duty on the
7 association to establish adequate reserves. Thus, it is the ownership or management that has the
8 duty of care to hire a competent reserve study specialist. Any obligations that arise on the part
9 of the reserve study specialist arise through the contractual relationship between the ownership
10 or management and the specialist and not because of the statute.

11 Since Nevada applied the economic loss doctrine to bar recovery in tort for purely
12 monetary harm in negligence cases, summary judgment is granted in favor of CS Consulting on
13 this claim. *Giles*, 494 F.3d at 879.

14 b. Negligent Misrepresentation

15 Generally, a claim for negligent misrepresentation is excluded from the economic loss
16 doctrine. *Terracon*, 206 P.3d at 87. This is because negligent misrepresentation is a special
17 financial harm claim for which tort recovery is permitted because without such liability the law
18 would not exert significant financial pressures to avoid such negligence. *Id.* at 88.

19 Defendant CS Consulting does not provide any legal support or persuasive reasoning as
20 to why Nevada’s general rule that negligent misrepresentation is excluded from the economic
21 loss argument should not apply. Instead, in its Reply, it merely focuses on the elements of a
22 negligent misrepresentation claim and why Plaintiffs cannot satisfy those elements. However,
23 as this argument was raised in the Reply, Plaintiffs did not have the opportunity to counter with
24 any argument or evidence to negate CS Consulting’s representations. Accordingly, the Court
25 finds that there is a genuine dispute regarding Plaintiffs’ negligent misrepresentation claim.

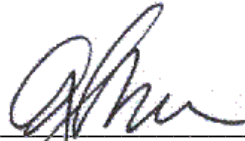
CONCLUSION

IT IS HEREBY ORDERED that Defendant CS Consulting Service, LLC's Motion for Summary Judgment (ECF No. 250) is **GRANTED in part and DENIED part**.

CS Consulting's request for summary judgment on Plaintiffs' claims for negligent misrepresentation, breach of contract and implied warranty is **DENIED**.

Summary Judgment is entered in favor of CS Consulting on Plaintiffs' claim for negligence.

DATED this 27th day of March, 2012.



Gloria M. Navarro
United States District Judge